IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned On Briefs September 16, 2008

STATE OF TENNESSEE v. SEAN DAVID ANDERSON

Direct Appeal from the Criminal Court for Putnam County
No. 06-0929 Leon Burns, Judge

No. M2007-02714-CCA-R3-CD - Filed October 20, 2008

The defendant, Sean David Anderson, pled guilty to two counts of vehicular homicide by intoxication, Class B felonies. He was sentenced to eleven years for each conviction and ordered to serve those sentences concurrently. On appeal, the defendant argues that the trial court erred by imposing more than the "presumptive minimum" sentence of eight years. Following our review of the parties' briefs, the record, and the applicable law, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal As of Right; Judgments of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

Randy Chaffin, for the appellant, Sean David Anderson.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; William Edward Gibson, District Attorney General; Anthony Craighead, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

The defendant pled guilty to two counts of vehicular homicide by intoxication, Class B felonies. The following proof was presented at the sentencing hearing:

Officer Greg Young of the Cookeville Police Department testified that he worked in the Traffic Division on August 16, 2006, when he was called to respond to the scene of an accident at 711 Clark Avenue. When he arrived, he observed a Jeep that was upside down and resting on top of a white Nissan in the driveway. The defendant was seated in the driveway near another police officer. Officer Young also observed two unconscious female victims; one trapped underneath the Jeep, and another located near the front left wheel of the Nissan. Officer Young stated that two of the female passengers in the Jeep, Becky Anderson and Lauren Knieling, were killed as a result of

the accident. Officer Young noted that the defendant had red watery eyes, was unsteady, and uncoordinated. Apart from appearing and smelling intoxicated, the defendant did not have any visible injuries. Officer Young watched as the defendant was given a field sobriety test and quickly determined that the defendant was intoxicated. The defendant was given a blood alcohol test and scored a .29, more than three times the legal limit of .08. According to Officer Young, a blood alcohol test was also administered to the other two female passengers, Megan Childers and Chua Philusa. Both women tested negative. Becky Anderson, who was still alive immediately after the accident, was rushed to a nearby hospital and did not receive a blood alcohol test.

Officer Young testified as an accident reconstructionist. According to Officer Young, the defendant was traveling at a high rate of speed when he drove through the intersection of Breeding Avenue and Robin Lane, crossed over a ditch, hit a pine tree, and continued across the backyard of the house on Clark Avenue. The defendant's Jeep hit the raised deck at the rear of the house, spun, and rolled over a retaining wall, causing it to land upside down on top of the white Nissan in the driveway.

Officer Young testified that the body of Lauren Knieling, one of the two deceased victims, was lying near the driver's side front wheel of the Nissan. Becky Anderson, the other victim who later died, landed in the hedges across the driveway. Officer Young stated that the distance between the Jeep and the hedges where Ms. Anderson landed was approximately thirty-six feet.

Megan Childers testified that she knew the defendant and was one of the passengers in his Jeep on the night of August 16, 2006. She stated that she and three other girls, Chua Philusa, Becky Anderson, and Lauren Knieling, went with the defendant to just "ride around a couple of minutes." According to Ms. Childers, the defendant's driving was not bad when she first go into the car. The group rode around aimlessly for a few minutes before driving through someone's front yard, "doing donuts and tearing up the yard." The defendant continued to drive around for a while longer before heading back toward the city of Cookeville. Ms. Childers stated that she was not drinking. She saw the defendant share a vegetable juice bottle with Becky Anderson but did not know what was in the bottle.

Ms. Childers testified that a few minutes before the crash, the defendant's driving began to concern her. The defendant was driving fast in circles, and did not appear to know where he was going. Ms. Childers stated that she switched seats with Lauren Knieling because she "got a really bad feeling" and she wanted a lap and shoulder seat belt. According to Ms. Childers, after she switched seats with Lauren, the defendant's driving got worse. The defendant drove through residential neighborhoods at speeds of up to seventy miles an hour. Ms. Childers recalled turning to look at Becky Anderson and then turning around again to see the speedometer. Immediately after glancing at the speedometer, Ms. Childers looked up in time to see the defendant drive through the stop sign on Robin Lane, cross the road, and hit a pine tree. The defendant did not use his brakes. Moments later the Jeep crashed and Ms. Childers felt the side of the Jeep scraping against the ground before it stopped.

Ms. Childers testified that she was upside down in the Jeep when it stopped and was held in place by her seat belt. The defendant was next to her. Becky Anderson was lying across the driveway in the hedges. Ms. Childers could not see where Lauren Knieling landed after the crash. She remembered unbuckling her seatbelt and falling to the ground. She stated that her left hand was broken and her right hand was badly mangled. After she stood up, she was able to see Chua Philusa on the hill by the retaining wall. Ms. Philusa had several bad scrapes, but did not appear to have any serious injuries. She stated that none of the backseat passengers were wearing their seatbelts.

Jamie McCurry testified that he was a Police Officer with the Cookeville Police Department on December 17, 2006, when he was called to a residence where he encountered the defendant. The defendant was unsteady on his feet and slurring his words. Officer McCurry smelled the strong odor of alcohol on the defendant. The defendant refused to answer general information questions and was uncooperative. Officer McCurry arrested the defendant for public intoxication and under-age alcohol consumption.

Brenda Anderson testified that the defendant was her son. She stated that the defendant was also the cousin of one of the deceased passengers, Becky Anderson. She stated that after the incident, she and her family relocated to Madison, Alabama. She further stated that she was prepared to provide the defendant with a place to live if the court determined that he was a suitable candidate for probation.

On cross-examination, Ms. Anderson testified that she was aware that the defendant had been arrested approximately six months after the accident on December 17, 2006. She acknowledged that she and her husband made an error in judgment by allowing the defendant to go to another friend's house where he was able to drink. Ms. Anderson stated however, that the defendant did not drive and did not have access to a car that evening. Prior to the accident, she was unaware that the defendant drank or had any other problems.

The defendant read from a prepared statement apologizing to the families of Becky Anderson and Lauren Knieling. The trial court found that no mitigating factors applied. The court applied two enhancement factors and sentenced the defendant to eleven years for each conviction. The court ordered that the defendant's sentences run concurrently. The defendant filed a timely notice of appeal.

II. ANALYSIS

On appeal, the defendant argues that the trial court erred by imposing a sentence above the presumptive minimum of eight years for each offense.

When a defendant challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all

relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. We will uphold the sentence imposed by the trial court if (1) the sentence complies with our sentencing statutes, and (2) the trial court's findings are adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001); *see also* Tenn. Code Ann. § 40-35-210(f). When determining a sentence, the trial court is required to consider the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing;
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> (2) The presentence report;
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> (3) The principles of sentencing and arguments as to sentencing alternatives;
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> (4) The nature and characteristics of the criminal conduct involved;
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> (5) Evidence and information offered by the parties on the mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114;
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> (6) Any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and
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> (7) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

Tenn. Code Ann. § 40-35-210(b).

In *State v. Carter*, 254 S.W.3d 335 (Tenn. 2008), the Tennessee supreme court addressed the issue of whether the trial court was still required to begin with the presumptive minimum term for a sentence and adjust upward in light of the 2005 amendments to the 1989 Sentencing Reform Act. The supreme court held that:

> Prior to 2005, the Sentencing Act set forth a "presumptive sentence" to be imposed within the applicable range: the minimum sentence for all felonies other than Class A felonies, and the midpoint sentence for Class A felonies. *Id.* § 40-35-210(c) (2003). Thus, in imposing a specific sentence within a given range, the trial court began with the presumptive sentence. *See id.*; *State v. Gomez*, 239 S.W.3d 733, 739 (Tenn. 2007) ("A sentencing court could not increase a defendant's sentence above the presumptive sentence except upon the application of statutory enhancement factors."). If the trial court determined that statutory enhancement

> factors applied, *see* Tenn. Code Ann. § 40-35-114 (2003), the trial court had the authority to increase the presumptive sentence up to the maximum within the range, *see id*. § 40-35-210(d). If the trial court determined that statutory mitigating factors also applied, *see id*. § 40-35-113, the trial court could reduce the enhanced sentence, *see id*. § 40-35-210(e) ("Should there be enhancement and mitigating factors for a Class B, C, D or E felony, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors."). The weight the trial court accorded any applicable enhancement and mitigating factors was left to the trial court's discretion. *Id*., Sentencing Comm'n Cmts.; *Gomez*, 239 S.W.3d at 739-40.
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> Our legislature amended the Sentencing Act in 2005 after the United States Supreme Court issued its opinion in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In *Blakely*, the high court decided that "[i]f the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 869, 166 L.Ed.2d 856 (2007) (citing *Blakely*, 542 U.S. at 305 & n. 8, 124 S.Ct. 2531). In order to avoid the constitutional violation arising from a trial court increasing a presumptive sentence on the basis of judicially-determined enhancement factors, the General Assembly revamped section -210 . . . .
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> The amended statute no longer imposes a presumptive sentence. Rather, the trial court is free to select any sentence within the applicable range so long as the length of the sentence is "consistent with the purposes and principles of [the Sentencing Act]." [Tenn. Code Ann.] § 40-35-210(d). Those purposes and principles include "the imposition of a sentence justly deserved in relation to the seriousness of the offense," *id*. § 40-35-102(1), a punishment sufficient "to prevent crime and promote respect for the law," *id*. § 40-35-102(3), and consideration of a defendant's "potential or lack of potential for . . . rehabilitation," *id*. § 40-35-103(5).

Id. at 342-343. Additionally, the trial court is required to place on the record, whether orally or in writing, what enhancement or mitigating factors were considered, "as well as the reasons for the sentence, in order to ensure fair and consistent sentencing." Tenn. Code Ann. § 40-35-210(e).

Upon review of the record, we note that the defendant argues that under *Blakely v. Washington*, 542 U.S. 296 (2004), he could not be sentenced to more than the presumptive sentence of eight years for a Class B felony as a Range I, standard offender. We conclude that this argument by the defendant is erroneous. As noted previously, the 2005 amendments to the 1989 Sentencing Reform Act no longer require application of a "presumptive minimum" sentence. Furthermore, we

conclude that contrary to the defendant's assertion, *Blakely* does not apply to his sentences. Because the offenses leading to the defendant's convictions occurred in August of 2006 and he pled guilty in September of 2007, determination of the defendant's sentences were within the trial court's discretion, so long as the trial court followed the "purposes and principles" of the Sentencing Act. *See* Tenn. Code Ann. § 40-35-210(d).

Vehicular homicide by intoxication is a Class B felony. The sentencing range for a Class B felony is between eight and twelve years for a Range I, standard offender. The record reflects that the court considered the required factors under Tennessee Code Annotated section 40-35-210(b). The court did not find that any mitigating factors applied but did find that two enhancement factors were applicable. Specifically, the court concluded that the defendant's crime involved more than one victim, and the defendant had no hesitation about committing a crime when the risk to human life was high. *See* Tenn. Code Ann. §40-35-114(3), (10). The defendant was sentenced within the appropriate range and classification of offenses to which he pled guilty. Therefore, we conclude that the trial court did not err in imposing an eleven year sentence for each conviction. The defendant is without relief as to this issue.

CONCLUSION

For the foregoing reasons, we affirm the judgments of the trial court.

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J.C. MCLIN, JUDGE